BANK BUMIPUTRA MALAYSIA BHD (SHAH ALAM)

v.

WEE CHYE LUAN & ANOR

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[ORIGINATING SUMMONS NO: 31-227-88]
20 NOVEMBER 2000

LAND LAW: *Sale of land - Order for - Application to set aside order for sale - Service of notice - Evidence of posting - Whether notice of adjourned hearing a nullity - Rules of the High Court 1980, O. 83 r. 2(4)*

The 1st respondent was the registered owner of some land which was charged as security for a loan of RM20,000 granted to her by the applicant bank. When the 1st respondent failed to repay the loan, the applicant applied for an order for sale. After many adjournments, at which the 1st respondent was consistently absent, the court granted an order for sale. The 2nd respondent purchased the land for RM30,010.

The 1st respondent filed an amended summons in chambers ('SIC') after the hearing for the initial SIC was postponed several times. The principal prayer in the amended SIC was that the order for sale be set aside because the 1st respondent did not receive prior notice of the adjourned hearing date.

The applicant raised two preliminary objections. Firstly, that the 1st respondent's affidavits and SIC should not be considered, as the applicant only received these documents after a delay of more than three months. Secondly, the 1st respondent's procedure by way of SIC was defective, as the correct way of proceeding was by filing a fresh suit. As for the application proper, the applicant submitted that the date of the adjourned hearing had been properly notified by AR registered post, and that all statutory procedural requirements had been complied with.

Held:

[1] On the first preliminary objection, both parties had earlier agreed to waive the issue of delay with regards to the affidavits. The applicant also did not raise an objection or file an appeal against the order when it was served with the SIC and the affidavit. Therefore, estoppel applied in both these instances, and the first preliminary objection was overruled.

[2] On the second preliminary objection, following the reasoning in the case of *Muniandy Tamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor*, and since there was no *inter parte* hearing that might have altered the situation, the mode of proceeding by way of SIC was correct. Hence, the second preliminary objection was also overruled.

[3] The validity of the order for sale depended on whether O. 83 r. 2(4) Rules of the High Court 1980 had been complied with. Following the case of *Amanah Merchant Bank Bhd v. Lim Tow Choon*, there must be some evidence that the notice had been acknowledged for service by the postal authority, *ie*, evidence that the letter had been posted. On the facts, a copy of the letter alone was insufficient to show posting as to contract the deeming clause. Therefore, the application to set aside the order for sale was granted, and the notice of the adjourned hearing was a nullity.

[Judgment for 1st respondent with costs to be borne by herself.]

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 ***(foll)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Muniandy Tamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 ***(foll)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(refd)***

United Malayan Banking Corpn Bhd v. Syarikat Perumahan Lunas Sdn Bhd [1988] 1 CLJ 577 ***(dist)***

Legislation referred to:

National Land Code 1965, s. 256(3)

Rules of the High Court 1980, O. 32 rr. 1(2), 13(2), O. 83 r. 2(4)

For the applicant - Mohd Badrillan Abdullah; M/s Yaacob & Partners
For the 1st respondent - RR Mahendran; M/s RR Mahendran
For the 2nd respondent - K Kalithazan Krishnan; M/s Thangaraj & Assoc

Reported by Suresh Nathan

JUDGMENT

Idris Yusoff J:

The 1st respondent was a registered owner of a piece of land known and identified as Lot 36 (Grant No. 11512) Section 4, Bandar Tumpat, in the district of Tumpat, in the state of Kelantan (the said property) which was charged as a security for a loan facility of RM20,000 granted to the the 1st respondent by the then Bank Bumiputra Malaysia Berhad, Shah Alam, Selangor (the applicant) on terms and conditions as therein stated in the instrument of charge (Form 16A) and the annexures thereto. The address given by the 1st respondent in the charge was No. 9, Jalan Bunga Chempaka, 2/11 Shah Alam, Selangor (the Shah Alam address). The said charge was registered on 6 January 1982 in the Register of Charge *vide* Presentation No. 25/82 Vol. 4 Folio No. 16. Upon the 1st respondent's failure to repay the loan the applicant applied to the court by way of originating summons for an order for sale pursuant to s. 256(3) of the National Land Code 1965 to satisfy the total sum due to the applicant as principal and interests plus costs. The applicant attempted to serve, the originating summons on the 1st respondent but failed and after a few futile attempts applied to the court to have an order of the said originating summons be served by way of substituted service. The application was granted by the court. Subsequently notice of appointment to hear the originating summons on 29 April 1990 was issued by the court but the said notice was not able to be served personally on the 1st respondent and as a result the notice was similarly ordered by the court to be effected by way of substituted service. Necessary steps were taken by the applicant in compliance with the said order of court but however the original hearing date fixed for 29 April 1990 was postponed to 2 September 1990 and a letter to that effect was sent by the SAR to both parties – the letter to the 1st respondent was sent to the Shah Alam address. On 2 September 1990 only the applicant was present and the hearing was again postponed to 4 November 1990. The 1st respondent was similarly informed of the new date by the applicant's counsel through an A.R. Registered letter using the Shah Alam address. There was evidence of posting of the said letter. On 4 November 1990 when the case was called up the applicant's counsel was present and the 1st respondent was absent but at the request of the applicant's counsel the hearing was postponed for four months and fixed for 31 March 1991 as the new date of hearing. Apparently the applicant claimed that the 1st respondent was also informed of the new hearing date through an A.R. registered letter dated 12 November 1990 which was also sent to the Shah Alam address.

When the case came on for hearing on 31 March 1991 the 1st respondent was again absent and on being so informed the court granted an order for sale as sought for after having recorded the outstanding balance due from the 1st respondent as on that date. The auction date was fixed for 27 July 1991. The usual summons for directions was filed and consequently the auction scheduled for 27 July 1991 was held but unfortunately had to be postponed for lack of bidder. In fact on account of the same reasons the auction was postponed a few times when finally on 31 July 1995 the 2nd respondent made a successful bid for RM30,010. The reserve price was fixed for RM30,000. On 26 August 1995 Form 16F was issued by SAR to 2nd respondent. That should be the end of the matter but that was not so for on 13 September 1995 the 1st respondent filed a summons in chambers (encl. 93) supported by her affidavit affirmed on 28 August 1995 (encl. 91) praying that all execution proceedings in the matter be stayed until further order from the court, that all proceedings and auction sale held on 31 July 1995 be set aside and costs of the application to be costs in the cause. Affidavit in reply and further affidavits were filed by both parties, and in the meanwhile the 2nd respondent was allowed to be included and cited as one of the parties. The hearing of the summons in chambers for some reasons was postponed several times and on 6 May 1998 the 1st respondent filed an amended summons in chambers (encl. 129) and supported by her affidavit sworn on 30 April 1998 (encl. 129B). The amendments were substantial and couched for the following terms:

a) Bahawa segala prosiding perlaksanaan dalam tindakan ini digantung sehingga perintah selanjutnya oleh Mahkamah Yang Mulia ini.

b) Bahawa segala prosiding dan penjualan menerusi lelongan awam yang dijalankan pada 31.07.1995 diketepikan dan dibatalkan.

c) Bahawa Perintah bertarikh 28/11/89 Penolong Kanan Pendaftar Mahkamah Yang Mulia dibatalkan atau diketepikan.

d) Bahawa Perintah jualan bertarikh 31/3/91 dibatalkan dan atau diketepikan.

e) Bahawa Perintah bertarikh 11/5/92 Penolong Kanan Pendaftar Mahkamah Yang Mulia ini dibatalkan dan atau diketepikan.

f) Bahawa penyampaian ganti Saman Untuk Arahan bertarikh 21/10/91 yang dilaksanakan pada 15/12/93 dan 28/12/93 dibatalkan dan atau diketepikan.

g) Bahawa Perintah bertarikh 7/3/94 Penolong Kanan Pendaftar Mahkamah Yang Mulia ini dibatalkan dan atau diketepikan.

h) c) Bahawa kos permohonan ini dijadikan kos dalam tindakan.

i) d) Relif lain dan selanjutnya yang dianggap patut dan sesuai oleh Mahkamah yang Mulia ini.

Of the amended prayers, prayer (d) is the most crucial while the others relate to the consequential proceedings which culminated in the auction sale on 31 July 1995.

As regards ground (d) counsel for 1st respondent in his submissions challenges the validity of the order for sale granted on 31 March 1991 on four grounds and it seems to me the validity or otherwise of the said order largely depends on one ground, namely, the 1st respondent did not receive the prior notice of the date of adjourned hearing to hear the notice of the appointment of the originating summons fixed for 31 March 1991, hence contrary to O. 83 r. 2(4) of the Rules of the High Court 1980. Order 83 r. 2(4) states:

> 2(4) Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.

In the event as contended by 1st respondent the order for sale granted by the court is a nullity relying on a Supreme Court decision in *Muniandy a/l Tamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586 which held at p. 596:

> In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the *ex parte* orders obtained, in consequence, a nullity ...

Counsel for the applicant in his submissions in reply, at the outset, raises two preliminary objections *viz.*

(1) that there was a delay in the first respondent's service of the Summons in Chambers dated 10 October 1995 and the Supporting Affidavit affirmed by Wee Chye Luan dated 28 August 1995; and

(2) the mode of proceeding for this application itself, by way of a summons in chambers is wrong and defective.

First Preliminary Objection

Counsel claims that the 1st respondent had failed to observe the requirements as prescribed in O. 32 r. 1(2) and r. 13(2) of the Rules of the High Court. He refers to encl. (91), affidavit of the 1st respondent dated 28 August 1995 and the SIC (encl. (93)) filed on 13 September 1995, these two documents were received by the applicant on 18 December 1995 – after a delay of more than three months. Hence as submitted by the applicant's counsel, the affidavit of the 1st respondent should not be considered and the SIC stands on its own merit without any supporting affidavit. Likewise the further affidavit of the 1st respondent affirmed on 28 March 1996 and her affidavit at encl. (129B) should be irrelevant as both affidavits cross-referred to the affidavit at encl. (91).

Second Preliminary Objection

The procedure adopted by the 1st respondent by way of SIC is defective as it should, in the circumstances of the case, be pursued by filing a fresh suit. Accordingly the application by SIC should be dismissed. Turning to the application proper, counsel for the applicant submits that the date of the adjourned hearing had been properly notified by A.R. registered post. He refers to exhs. (26) and (27) of the affidavit affirmed by one Zahariah bt Abu Kasim on 23 July 1998 (encl. 149). Hence counsel claims that all the statutory procedural requirements had been complied with and there seems to be no reasons for the order for sale dated 31 March 1991 to be set aside.

Counsel for the 2nd respondent (the successful bidder) submits that the order for sale is valid – it being granted in accordance with the law and is thus binding on all parties and the auction date fixed by the court should stand. He further submits that the 1st respondent had also failed to show the existence of "cause to the contrary". In fact as argued by counsel the moment the court granted the order and fixed an auction date the court was *functus officio* and the 1st respondent is not competent to make an application to set aside the order by way of SIC – in fact the 1st respondent should file an appeal against the said order. He cites a number of authorities decided by Supreme Court, Court of Appeal as well as High Court. The case of *Muniandy (supra)* is distinguished on its facts.

I shall now deal with the preliminary objections raised by the applicant. Concerning the 1st preliminary objection as pointed out by counsel for the 1st respondent in his reply that the applicant is estopped from raising this issue by the principal of waiver having regard to the parties having agreed earlier not to quibble over this issue. Counsel refers to the affidavit of the 1st respondent at encl. (150) at para 16(a) which reads:

> 16(a) Saya merujuk kepada perenggan 19 Afidavit Tambahan tersebut dan menyatakan dan dinasihati oleh peguamcara saya bahawa peguam Pemohon pada masa meterial Puan Sharizat pada tarikh awal perbicaraan Saman Dalam Kamar di premis Mahkamah Kota Bharu telah berbincang dengan Peguam saya Encik R R Mahendran dan kedua-dua Peguam telah setuju tidak akan menegaskan had masa untuk pemfailan Afidavit atas alasan peguam Pemohon beralamat di Klang dan Peguam saya di alamat Johor Bahru pada hal perbicaraan di Kota Bharu.

It is to be noted that there was no reply by the applicant to the said para 16(a), the applicant is thus presumed to have confirmed such fact that the parties will not raise the issue of delay under O. 32 r. 13. In *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 at p. 614 the Court of Appeal said:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332.

It is also noted that by a SIC filed by the 1st respondent dated 11 December 1996 (encl. 114) and supported by an affidavit affirmed on 10 December 1996 (encl. 113) to reinstate the SIC at encl. (93) were served on the applicant. The application was granted by the court when no objection was raised by counsel for the applicant. He could have raised the question of delay of service of encl. (93) and the affidavit at encl. (91) or he should have appealed against the said order. Similarly when the SIC dated 6 May 1998 (encl. 129) was filed to amend the SIC at encl. (93) the applicant was served with both documents – encl. (129) together with the affidavit in support thereof at encl. (129B). If the applicant was mindful of raising the objection on the delay it could have so done but it did not and neither did it file an appeal against the order. It is the submissions of counsel for the 1st respondent that "issue estoppel also applies to such issue which might have been raised but was not brought forward and thus not actually decided by the court" – see *Asia Commerical Finance (M) Bhd v. Kawal Teliti Sdn Bhd.* [1995] 3 AMR 2559 (SC) and at p. 2561 under held (d) – see also the decision of Court of Appeal in *Structural Concrete Sdn Bhd. & 3 Ors v. Wing Tiek Holdings Bhd* [1997] 1 AMR 598 at 604 lines 7-15. In the circumstances I overrule the first preliminary objection.

Coming to the 2nd preliminary objection, counsel for the 1st respondent submits that the mode of proceeding adopted in this case is correct and not defective. In so submitting counsel relies on *Muniandy (supra)* where

the facts show that "the appeal raised out of the unsuccessful chargor's application **by way of SIC** to set aside an order for sale made pursuant to s. 256(3) of the National Land Code 1965" (emphasis added). The appeal was successful for reasons stated therein and the mode of proceeding as adopted (*viz.* SIC) was proper and in order. Accordingly I also overrule the second preliminary objection. Perhaps the position might be different if the order for sale was given after an *inter parte* hearing, in which case the only course open to the aggrieved party is to file an appeal against the said order – see *United Malayan Banking Corpn. Bhd v. Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 CLJ 577 and also the Supreme Court decision in *Low Lee Lian v. Ban Hin Lee Bank Berhad* [1997] 2 CLJ 36. I now proceed to hear the application on its merit.

As said earlier the crux of 1st respondent's application is the non receipt of the notice of postponed hearing of appointment to hear the originating summons and exhibited to the affidavit of Zahariah bt Abu Kasim is a copy of a letter dated 12 November 1990 sent to the 1st respondent using the Shah Alam address with the caption A.R. REGISTERED (exh. 27). By so doing as submitted by the applicant's counsel would be sufficient compliance with O. 83 r. 2(4) of the Rules of the High Court since there is a deeming clause in the charge annexure to that effect. Probably the applicant is relying on the decision of the Supreme Court in *Amanah Merchant Bank Bhd. (Formerly Known As Amanah Chase Merchant Bank Bhd.)* [1994] 2 CLJ 1 where the court said at p. 5:

> In the context of cl. 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

A certain portion of the deeming clause in the charge annexure in the instant application is similar in substance and form to the one in *Amanah Merchant Bank*. The emphasis is on the evidence of posting. Thus by exhibiting a copy of a letter (exh. 27), without more, is hardly sufficient to show posting as to contract the deeming clause! Consequently I hold that there is no evidence sufficiently to show that the notice of adjourned hearing of the notice of appointment to hear the originating summons was sent to 1st respondent as required by O. 83 r. 2(4) of the Rules of the High Court. I therefore hold the application of the 1st respondent to set aside the order for sale granted on 31 March 1991 is well taken and

following *Muniandy*'s case, I consider the notice a nullity. Since it is a nullity, delay is no bar to 1st respondent applying to set aside the said order. In consequence thereof the sale of the land to 2nd respondent is set aside and the sale price is to be refunded to him.

Though the 1st respondent succeeds in her application I feel it is not out of place to say a few words about her conduct in this matter. It will be noted that in time of need for financial aid, she went to seek assistance from the applicant for a loan. Having executed a charge as a security, the applicant then disbursed the whole amount of the loan to her. No doubt it was a secured loan but there were also certain other obligations that call for observance as apart from her having had it to repay the loan she was also required to notify the applicant of any change in her address to facilitate correspondence between them. It is appreciated that a few letters were exchanged between them using the address in Singapore but I consider it unsafe and in fact leaves room for doubt for the applicant to assume that there was a change of address for she did not say in no uncertain terms that she has moved residence to Singapore and considering the manner she used the Singapore address it could be presumed that such address was used as a temporary expediency whilst she was in Singapore. Judging from her educational background I have no doubt that had she shown a bit of initiative or courtesy the whole process would not be an exercise in futility. In fact she was offered a redemption sum of RM30,000 (the amount equivalent to the reserve price in the auction) but she chose not to response to the offer and ought thereby to realise that the auction sale would be in the offing. Nevertheless she waited until the whole auction proceedings were over before looking for any legal loophole. Such a conduct leaves much to be desired and ought to be deprecated. In the circumstances I feel it unjustified to award costs to her – I order that each party bears its own costs except for 2nd respondent, who was not in any way responsible or contributed to this unfortunate episode, his costs and any stamp duty if paid would have to be borne and paid by the applicant.